

# Defending the Defenders: Upholding the Right to Effective Remedy of Environmental Defenders in the Philippines

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## I. INTRODUCTION

Environmental degradation usually carries with it a high human cost<sup>1</sup> because of the inextricable link between human beings and natural resources.<sup>2</sup> Human costs can be a direct repercussion of destructive activities, as in the case of the contamination of water that a neighborhood drinks,<sup>3</sup> or the spread of toxic air that people breathe. However, human costs can also take the form of the loss of human life when ordinary citizens, indigenous people, farmers, journalists, lawyers, and others fearlessly and peacefully take action to assert their rights relating to land, water, and air.<sup>4</sup> These martyrs are environmental human rights defenders.<sup>5</sup> It is said that the protection of environmental defenders is “part and parcel of the overall protection of the environment[,]”<sup>6</sup> an obligation which the State owes its citizens. In a period of murders of and attacks against environmental defenders,<sup>7</sup> the State’s obligation to protect them is of primordial significance.

This Article looks into the extent of this State obligation, particularly in upholding the right of environmental defenders or their survivors to an effective remedy after the killing or attack, and the State’s duty to ensure that protective measures, in terms of legal and institutional arrangements, are in place to address the root causes of these killings. Part I of this Article contextualizes the issue in the Philippines, which is considered as one of the most dangerous places for environmental defenders,<sup>8</sup> as illustrated in the cases

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1. Aaron Sachs, *Upholding Human Rights and Environmental Justice*, THE HUMANIST 5, 5 (1996).
  2. See Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103, 104 (1991).
  3. See Anna van Ojik, *Agua Zarca: Indigenous Fight Against Dam Costs Lives*, available at <https://www.bothends.org/en/Our-work/Dossiers/Agua-Zarca-indigenous-fight-against-dam-costs-lives> (last accessed July 31, 2021) [<https://perma.cc/5PF2-4764>].
  4. U.N. Secretary-General, *Situation of Human Rights Defenders*, ¶ 1, 71st Session of the General Assembly, U.N. Doc A/71/281 (Aug. 3, 2016).
  5. *Id.* ¶ 7.
  6. *Id.* ¶ 92.
  7. *Id.* ¶ 1.
  8. Cathrine Gonzales, *PH Deadliest Country in Asia, 2nd Deadliest in the World, for Land Rights Defenders — Report*, PHIL. DAILY INQ., July 29, 2020, available at <https://newsinfo.inquirer.net/1313863/ph-deadliest-country-in-asia-for-land-rights-defenders-report> (last accessed July 31, 2021) [<https://perma.cc/W84C-NP3X>].

of Gerardo “Gerry” V. Ortega and many other silenced voices. Part II examines the legal standards of the right to effective remedy under both international human rights law regimes and domestic constitutional law vis-à-vis the Philippines’ duty to comply with these standards. Finally, Part III scrutinizes Philippine mining and forestry laws insofar as they provide necessary space for environmental defenders and the general public to participate and be heard in decision-making processes. This Part likewise looks into the limits of the powers of the Commission on Human Rights (CHR) as the primary government agency dealing with violations of human rights,<sup>9</sup> including the rights of environmental defenders.

*A. The Case of Gerry Ortega and Many Silenced Voices*

On 24 January 2011, after his radio program and prior to a flight to Manila for the launch of his signature campaign to ban mining operations in Palawan, Gerry Ortega was shot in cold blood in broad daylight.<sup>10</sup> When the gunman was captured, he initially told the authorities that his intention was only to rob Ortega.<sup>11</sup> A reinvestigation of the case, however, revealed the link between the gunman and the purported masterminds — the former Governor of Palawan and his brother, a former town Mayor.<sup>12</sup> While the gunman was eventually sentenced to life imprisonment after confessing to his crime,<sup>13</sup> the alleged masterminds went into hiding overseas for more than four years until

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9. PHIL. CONST. art. XIII, § 18 (1).

10. Stanley Palisada, *Radio Anchor Killed in Palawan*, ABS-CBN NEWS, Jan. 24, 2011, available at <http://news.abs-cbn.com/nation/regions/01/24/11/radio-anchor-killed-palawan> (last accessed Sept. 4, 2021) [perma.cc/KLA4-WPX6] & Philippines: UNESCO Stands by as Forests and Livelihoods Are Destroyed on Palawan, available at <https://www.rainforest-rescue.org/petitions/667/philippines-unesco-stands-by-as-forests-and-livelihoods-are-destroyed-on-palawan#letter> (last accessed July 31, 2021) [https://perma.cc/LPN2-P75J].

11. Palisada, *supra* note 10.

12. *See* De Lima v. Reyes, G.R. No. 209330, 779 SCRA 1, 8-9 (2016).

13. Redempto D. Anda, *Gunman in Ortega Slay Gets Life Term*, PHIL. DAILY INQ., May 8, 2013, available at <https://newsinfo.inquirer.net/403965/triggerman-in-ortega-slay-gets-life-imprisonment> (last accessed July 31, 2021) [https://perma.cc/C4V7-3BTD].

they were caught<sup>14</sup> and deported back to the Philippines.<sup>15</sup> However, despite the accused having been placed in police custody, to this day, 10 years after Ortega's death, the murder case against the alleged masterminds has not yet reached its final resolution.<sup>16</sup> Although the anti-graft court (Sandiganbayan) sentenced the former Governor of Palawan to imprisonment and perpetual disqualification from holding a public office in connection with his giving of unwarranted benefits to a mining company,<sup>17</sup> the separate murder case filed against him and his brother (the former Mayor) is still an ongoing battle.<sup>18</sup> On 4 January 2018, the Court of Appeals upheld the former Governor's petition questioning his trial as a suspect in the murder of Ortega.<sup>19</sup> As a consequence of the appellate court's decision, he was released from jail despite his earlier conviction in a graft case.<sup>20</sup> However, on 28 November 2019, acting upon the motion for reconsideration filed by the Office of the Solicitor General (OSG), a new composition of the Court of Appeals division handling the case reversed its earlier 4 January 2018 ruling and ordered the reinstatement of criminal proceedings against the alleged mastermind.<sup>21</sup> But, trial continues and is nowhere at its end.

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14. *Reyes Brothers Back in PHL After Deportation from Thailand*, GMA NEWS, Sept. 25, 2015, available at <http://www.gmanetwork.com/news/news/nation/538267/reyes-brothers-back-in-phl-after-deportation-from-thailand/story> (last accessed July 31, 2021) [<https://perma.cc/5C9J-JX57>].

15. *Id.*

16. Lynette dela Cruz, *6 Years Later, Doc Gerry's Kin Still Waiting for Justice*, ABS-CBN NEWS, Jan. 24, 2017, available at <http://news.abs-cbn.com/news/01/24/17/6-years-later-doc-gerrys-kin-still-waiting-for-justice> (last accessed July 31, 2021) [<https://perma.cc/SD8Q-DHE9>].

17. *People v. Reyes, et al.*, Criminal Case No. SB-11-CRM-0088, Aug. 29, 2017, at 33, available at [https://sb.judiciary.gov.ph/DECISIONS/2017/H\\_Crim\\_SB-11-CRM-0088\\_People%20vs%20Reyes,%20et%20al\\_08\\_29\\_2017.pdf](https://sb.judiciary.gov.ph/DECISIONS/2017/H_Crim_SB-11-CRM-0088_People%20vs%20Reyes,%20et%20al_08_29_2017.pdf) (last accessed July 31, 2021). It is unclear whether this decision of the anti-graft court was brought before the Philippine Supreme Court for review.

18. See dela Cruz, *supra* note 16.

19. CNN Philippines Staff, *Ex-Palawan Governor in Gerry Ortega Slay Walks Free*, CNN PHIL., Jan. 6, 2018, available at <https://cnnphilippines.com/news/2018/01/06/Ex-Palawan-governor-in-Gerry-Ortega-slay-ordered-released.html> (last accessed July 31, 2021) [<https://perma.cc/KV4B-78S2>].

20. *Id.*

21. Llanesca T. Panti, *CA Reinstates Murder Raps vs. Ex-Palawan Gov Reyes Over Environmentalist's 2011 Slay*, GMA NEWS, Dec. 20, 2019, available at <https://www.gmanetwork.com/news/news/nation/719748/ca-reinstates->

During his lifetime, Ortega was a well-known journalist whose advocacy centered on environmental crusade and anti-mining activism.<sup>22</sup> His exposé on the misuse of the *Malampaya* fund which consisted of royalties earned by the government from offshore natural gas by certain Palawan political leaders,<sup>23</sup> as well as his criticism of the former Governor's inability to prevent abuse by mining companies in Palawan, led to his untimely death.<sup>24</sup>

Ortega's murder may be considered a high-profile case that involved prominent public figures, with the story still being followed by various news channels today.<sup>25</sup> However, there are still a number of environmental defenders whose social standing might not be as popular as Ortega's, but whose voices have been permanently silenced. Achieving justice for their deaths remains elusive.

Gloria Capitan is one of those small voices who was murdered for valiantly standing up against powerful interests. The 57-year old was shot in the head while sitting next to her family's karaoke bar on the evening of 1 July 2016.<sup>26</sup> Prior to her death, Capitan led a community-based organization lobbying for an anti-coal movement in her home province of Bataan.<sup>27</sup> She organized campaigns, lodged complaints before the courts, and collected signatures for the closure of a coal stockpile and power plant, which were allegedly spewing

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murder-raps-vs-ex-palawan-gov-reyes-over-environmentalist-s-2011-slay/story (last accessed July 31, 2021) [<https://perma.cc/U4RY-8B57>].

22. See Teresa Lorena A. Jopson, *Silent Assault: Multilevel Censorship as Media Repression in the Philippines*, 65 PHIL. SOC. SCI. REV. 45, 64 (2013).
23. Michael Bueza, *TIMELINE: Gerry Ortega Murder Case*, RAPPLER, Sept. 22, 2015, available at <https://www.rappler.com/newsbreak/iq/timeline-gerry-ortega-murder-case> (last accessed July 31, 2021) [<https://perma.cc/LWZ6-NU73>].
24. Jopson, *supra* note 22, at 64.
25. See Romar Miranda, *New Arrest Warrant Out for Ex-Palawan Governor in Ortega Slay*, PHIL. DAILY INQ., Aug. 12, 2021, available at <https://newsinfo.inquirer.net/1472514/new-arrest-warrant-out-for-ex-palawan-gov-in-ortega-slay> (last accessed July 31, 2021) [<https://perma.cc/GHD3-N8FH>].
26. Greg Refraccion, *Anti-Coal Advocate Shot Dead in Bataan*, PHIL. DAILY INQ., July 2, 2016, available at <http://newsinfo.inquirer.net/793909/anti-coal-advocate-shot-dead-in-bataan> (last accessed July 31, 2021) [<https://perma.cc/6TMN-2NTH>].
27. See Front Line Defenders, *Case History: Gloria Capitan*, available at <https://www.frontlinedefenders.org/en/case/case-history-gloria-capitan> (last accessed July 31, 2021) [<https://perma.cc/5HG4-NV4Z>].

toxic ash in her neighborhood.<sup>28</sup> Accordingly, attempts were made to bribe her and to convince her to stop the organization of anti-coal activities, but she refused.<sup>29</sup> It is unclear whether her perpetrators were apprehended. Her husband said that the local police “[did not] even investigate the crime scene; family members retrieved the bullets themselves.”<sup>30</sup> Capitan’s surviving “family [thus] had little confidence that filing a complaint with the police would lead to an arrest[.]”<sup>31</sup>

Another notable killing was that of Ruben V. Arzaga. On 14 September 2016, Arzaga, a barangay (village) captain in El Nido, Palawan, was ambushed and killed by suspected illegal loggers during an anti-illegal logging operation.<sup>32</sup> Arzaga was an active member of the board managing a protected area in El Nido and Taytay, Palawan.<sup>33</sup> He had devoted his life to protecting the watersheds that provide clean water for both residents and tourists in his locality.<sup>34</sup> Reports state that the two suspects in his killing were apprehended and charged with murder.<sup>35</sup> Nevertheless, information is scarce regarding the progress of the trial. In fact, Arzaga’s death is one of the many that came after.<sup>36</sup>

In living, Ortega, Capitan, and Arzaga proved that having a healthy environment requires community involvement, as well as the assertion of the right to a healthy environment in addition to other basic human rights. Their legacies establish that protecting the environment is not merely shielding flora

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28. *Id.*

29. Derek Cabe, For Ate Gloria Capitan, A Comrade in the Struggle, *available at* <https://world.350.org/philippines/for-ate-gloria-a-comrade-in-the-struggle> (last accessed July 31, 2021) [<https://perma.cc/EW6N-BS28>].

30. Jonathan Kaiman, *A Philippines Grandmother Fought to Get a Toxic Coal Stockpile out of Her Neighborhood. Three Bullets Stopped Her*, L.A. TIMES, Dec. 28, 2017, *available at* <http://www.latimes.com/world/asia/la-fg-environmental-activists-philippines-20171228-htmstory.html> (last accessed July 31, 2021) [<https://perma.cc/HZM2-P8S9>].

31. *Id.*

32. Keith Anthony Fabro, *Cimatu Honors Slain Anti-Logging Official in El Nido*, RAPPLER, Sept. 24, 2017, *available at* <https://www.rappler.com/nation/cimatu-honor-killed-anti-logging-official-el-nido> (last accessed July 31, 2021) [<https://perma.cc/V84B-WL6E>].

33. *Id.*

34. *Id.*

35. *Id.*

36. See GLOBAL WITNESS, DEFENDING THE PHILIPPINES 6-7 (2019).

and fauna from destructive practices, but also securing the lives of people who defend the right to a sustainable environment.

*B. The Trend and the Root Causes of Violations*

The threat to life faced by environmental defenders in the Philippines is not a novel issue in the administration of President Rodrigo R. Duterte, but it is one that has intensified during his regime.<sup>37</sup>

In its July 2020 publication titled “Defending Tomorrow,” Global Witness reported that 212 land and environmental defenders were killed around the world in 2019, with 43 being from the Philippines.<sup>38</sup> Accordingly, this number is higher than it was in 2018, when the total was at 30.<sup>39</sup> This made the Philippines the second deadliest country for environmental defenders after Colombia.<sup>40</sup>

Global Witness also noted that the “[c]riminali[z]ation and threats from new draconian legislation increases the risks for activists.”<sup>41</sup> The statement refers to the newly enacted Anti-Terrorism Act of 2020,<sup>42</sup> which allegedly broadens the definition of terrorism to possibly cover even legitimate acts of expression.<sup>43</sup> Global Witness mentioned in the same report that prevalent red-tagging in President Duterte’s government and the inflammatory calls by the President himself against activists put land and environmental defenders at much greater risk of attack.<sup>44</sup>

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37. *Id.*

38. GLOBAL WITNESS, DEFENDING TOMORROW 6 & 9 (2020) [hereinafter GLOBAL WITNESS, DEFENDING TOMORROW].

39. *Id.* at 6.

40. *Id.* at 9.

41. *Id.* at 27.

42. An Act to Prevent, Prohibit and Penalize Terrorism, Thereby Repealing Republic Act No. 9372, Otherwise Known as the “Human Security Act of 2007” [The Anti-Terrorism Act of 2020], Republic Act No. 11479 (2020).

43. *See id.* § 4 & Ben Rosario & Ellson Quismorio, *The Anti-Terrorism Law: A Law Against Terrorists, or a Terrifying Law?*, MANILA BULL., Aug. 14, 2020, available at <http://mb.com.ph/2020/08/14/the-anti-terrorism-law-a-law-against-terrorists-or-a-terrifying-law> (last accessed July 31, 2021) [<https://perma.cc/NC6F-LWCW>].

44. GLOBAL WITNESS, DEFENDING TOMORROW, *supra* note 38, at 28 (citing U.N. High Commissioner for Human Rights, *Situation of Human Rights in the Philippines*, Human Rights Council, U.N. Doc A/HRC/44/22 (June 29, 2020);

This is not a recent trend. In the early years of President Duterte’s term, several non-governmental organizations (NGOs) raised the alarming increase of killings and abuses of environmental defenders.<sup>45</sup> These NGOs noted that there were intensified military operations — in the guise of counter-insurgency programs of Martial Law<sup>46</sup> — in South Cotabato against indigenous tribe (*T’boli* and *Dulangan Manobo*) members who opposed coal mine operations in their ancestral lands.<sup>47</sup> They also reported various incidents of “extrajudicial killings, illegal arrests, enforced disappearances[,] and forced evacuations”<sup>48</sup> in the provinces of Mindoro Oriental and Batangas, among others,<sup>49</sup> which are areas outside the coverage of President Duterte’s Martial Law proclamation.<sup>50</sup>

As in Ortega’s case, there is a lack of certainty as to whether these killings and attacks were sufficiently resolved or even investigated. Global Witness’ findings are aligned with Human Rights Watch’s 2021 World Report, which also mentions that the rise of threats and attacks against environmental activists,

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Manuel Mogato, *Philippines Seeks ‘Terrorist’ Tag for 600 Alleged Communist Guerrillas*, REUTERS, Mar. 8, 2018, available at <https://www.reuters.com/article/us-philippines-rebels/philippines-seeks-terrorist-tag-for-600-alleged-communist-guerrillas-idUSKCN1GKoDO> (last accessed July 31, 2021) [<https://perma.cc/HM3L-ZPNS>]; Hannah Ellis-Petersen, *Philippine President Duterte Needs Psychiatric Evaluation, Says UN Chief*, GUARDIAN, Mar. 9, 2018, available at <https://www.theguardian.com/world/2018/mar/09/philippines-lists-un-special-rapporteur-on-terrorist-hit-list-rodrigo-duterte> (last accessed July 31, 2021) [<https://perma.cc/Y24Y-WWNE>]; & Mong Palatino, *The Trouble With Duterte’s New Terror List*, DIPLOMAT, Apr. 3, 2018, available at <https://thediplomat.com/2018/04/the-trouble-with-dutertes-new-terror-list> (last accessed July 31, 2021) [<https://perma.cc/4QNG-ZHHN>].

45. *Id.*

46. Office of the President, *Declaring a State of Martial Law and Suspending the Privilege of the Writ of Habeas Corpus in the Whole of Mindanao*, Proclamation No. 216 [Proc. No. 216, s. 2017] (May 23, 2017).

47. BusinessMirror, *109 NGOs Raise Alarm over Attacks Against Environmental Defenders*, BUSINESSMIRROR, Dec. 10, 2017, available at <https://businessmirror.com.ph/2017/12/10/109-ngos-raise-alarm-over-attacks-against-environmental-defenders> (last accessed July 31, 2021) [<https://perma.cc/PN9U-VC5F>].

48. *Id.*

49. *Id.*

50. See Proc. No. 216, s. 2017, § 1.



among others, in the Philippines along with the rise of extrajudicial killings under the war on drugs.<sup>51</sup> The Human Rights Watch observed that “[t]here has been almost total impunity for these killings.”<sup>52</sup>

Worth noting is Global Witness’ account that the top three sectors where attacks usually occur are industries involving: (1) mining and extractive; (2) agribusiness; and (3) logging.<sup>53</sup> This finding is reflective of the cases of Ortega, Capitan, and Arzaga. In fact, an earlier report by Global Witness similarly observed that in the Philippines, “[m]ost murders were linked to mining, coal [(as in the case of Gloria Capitan),] and extractive industries, whilst half of those killed were indigenous people[.]”<sup>54</sup> Moreover, Global Witness attributed the attacks to the “imposition of [extractive] projects on communities without their free, prior[,] and informed consent [(FPIC),]”<sup>55</sup> which governments and the business sector fail to address.

Previously, in its May 2017 National Report to the Human Rights Council, the Philippine government mentioned a number of actions it had taken, which were directly or indirectly related to the plight of environmental defenders in the country.<sup>56</sup> For instance, while the government admitted in the report that there is no domestic law specifically defining extrajudicial killings (EJKs),<sup>57</sup> the Duterte administration adopted the definition of EJKs from Administrative Order (A.O.) No. 35, Series of 2012,<sup>58</sup> issued under the administration of former President Benigno Simeon C. Aquino III.<sup>59</sup> A.O.

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51. HUMAN RIGHTS WATCH, *WORLD REPORT 2021: EVENTS OF 2020* 541-42 (2021).

52. *Id.* at 541.

53. GLOBAL WITNESS, *DEFENDING TOMORROW*, *supra* note 38, at 9.

54. GLOBAL WITNESS, *DEFENDERS OF THE EARTH 31* (2017) [hereinafter *GLOBAL WITNESS, DEFENDERS OF THE EARTH*].

55. *Id.* at 7.

56. Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Philippines*, ¶¶ 106-07, U.N. Doc. A/HRC/WG.6/27/PHL/1 (May 1, 2017) [hereinafter *UPR Philippine National Report 2017*].

57. *Id.* ¶ 102.

58. Office of the President, *Creating the Inter-Agency Committee on Extra-Legal Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty and Security of Persons*, Administrative Order No. 35, Series of 2012 [A.O. No. 35, s. 2012] (Nov. 22, 2012).

59. Inter-Agency Committee (IAC) on Extra-Legal Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty

No. 35 created an Inter-Agency Committee (IAC) on Extra-Legal Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty, and Security of Persons, which is chaired by the Secretary of Justice.<sup>60</sup> Among the functions of this Committee are to investigate, prosecute, and monitor new and unsolved cases,<sup>61</sup> and to submit reports to the President regarding the accomplishments and progress of such cases.<sup>62</sup> The Philippine National Report likewise mentioned President Duterte's Administrative Order No. 1, Series of 2016,<sup>63</sup> which created a Presidential Task Force on Violence against Media Workers, the functions of which are akin to that of the IAC.<sup>64</sup> President Duterte's administration was essentially stating through this report that there is no State policy to kill dissenters.<sup>65</sup>

This notwithstanding, the culture of corruption and impunity persists in the Philippines and is considered to be the underlying reason why the country ranks as one of the most dangerous places for environmental defenders.<sup>66</sup> The United Nations (UN) High Commissioner for Human Rights (UNHCHR) reported in June 2020 that “[d]espite efforts [of the Philippine Government] to strengthen the mechanism under Administrative Order No. 35, *the Government has failed to ensure transparent, independent, effective investigations and prosecutions in the vast majority of cases* [involving killings of human rights defenders].”<sup>67</sup> The killings of land and environmental defenders still occur,

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and Security of Persons, Operational Guidelines of Administrative Order No. 35, art. 1 (1) (2013).

60. A.O. No. 35, s. 2012, § 1.

61. *Id.* §§ 2 (b)-(d).

62. *Id.* § 2 (f).

63. Office of the President, Creating the Presidential Task Force on Violations of the Right to Life, Liberty and Security of the Members of the Media, Administrative Order No. 1, Series of 2016 [A.O. No. 1, s. 2016] (Oct. 11, 2016) & UPR Philippine National Report 2017, *supra* note 56, ¶ 122.

64. *See* A.O. No. 1, s. 2016, §§ 2 & 4.

65. UPR Philippine National Report 2017, *supra* note 56, ¶ 104.

66. Gonzales, *supra* note 8.

67. U.N. High Commissioner for Human Rights, *supra* note 44, ¶ 50 (citing GoJust, Governance in Justice: A Justice Sector Reform Programme, *available at* <https://gojust.org> (last accessed Sept. 5, 2021) [perma.cc/4LWA-3YZS] & International Labour Organization Country Office for the Philippines, Addressing Impunity: A Review of the Three Monitoring Mechanisms, *available at* <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo->

especially in “Mindanao, Negros Island, the Cordillera Administrative Region, [ ] Palawan[,] and Bataan[.]”<sup>68</sup> This issue is related to the 2016 Report of the Special Rapporteur on the Situation of Human Rights Defenders, which expressed concern about the “lack of independent and prompt investigations into attacks perpetrated against environmental human rights defenders, which is often linked to a lack of resources, corruption[,] and collusion between perpetrators[ ]”<sup>69</sup> in some developing countries like the Philippines.<sup>70</sup> The absence of an effective response from the Philippine government, accordingly, perpetuates impunity and distrust by environmental defenders from the justice system itself.<sup>71</sup> The Special Rapporteur noted that in many countries, there is little to no action at all being taken by the government with respect to violations of the rights of environmental defenders,<sup>72</sup> resulting into a so-called “*de facto* impunity.”<sup>73</sup> The Special Rapporteur also echoed the findings of Global Witness that mining, extractive industries, and logging are among the more dominant areas where murders or violations of environmental defenders’ rights occur,<sup>74</sup> and that there is an observable connection between violations and the areas where environmental defenders work.<sup>75</sup>

The assassinations of Ortega, Capitan, and Arzaga, and the silencing of countless other voices of environmental defenders vis-à-vis the prevalence of *de facto* impunity<sup>76</sup> that somehow legitimizes the actions of the perpetrators, raise the legal issue of the extent of the Philippine government’s obligation, under both the international human rights law regime and domestic constitutional law, to realize the right to effective remedy of these environmental defenders. Correlatively, this issue relates to the sufficiency or

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manila/documents/publication/wcms\_713337.pdf (last accessed July 31, 2021) [https://perma.cc/NGA6-3SJ5]) (emphasis supplied).

68. U.N. High Commissioner for Human Rights, *supra* note 44, ¶ 69.

69. U.N. Secretary-General, *supra* note 4, ¶ 51.

70. *Id.*

71. *Id.* (citing Observatory for the Protection of Human Rights Defenders, 2014 Annual Report, available at [https://www.omct.org/site-resources/legacy/annualreportomct2014\\_2021-06-17-083934\\_ngdg.pdf](https://www.omct.org/site-resources/legacy/annualreportomct2014_2021-06-17-083934_ngdg.pdf) (last accessed July 31, 2021) [https://perma.cc/GUX5-VCXU]).

72. U.N. Secretary-General, *supra* note 4, ¶ 70.

73. *See id.* ¶ 51.

74. *Id.* ¶ 27.

75. *Id.* ¶ 37.

76. *See id.* ¶ 51.

insufficiency of legal and institutional arrangements in the Philippines to protect such right to effective remedy after a murder of or attack against an environmental defender occurs.

## II. THE PHILIPPINES' OBLIGATION TO UPHOLD THE RIGHT TO EFFECTIVE REMEDY OF ENVIRONMENTAL DEFENDERS

The need to protect environmental defenders springs from the generally recognized moral responsibility to respect human dignity,<sup>77</sup> and the fact that these defenders, being humans themselves, are holders of the right to life — the “supreme right from which no derogation is permitted even in time of public emergency[,]”<sup>78</sup> as the Human Rights Committee interprets it. The effective protection of this fundamental right is a prerequisite or an indispensable condition for “the enjoyment of all other human rights[.]”<sup>79</sup>

Closely associated with the right to life are the rights to liberty and security of the person, both of which are embedded in the core international human rights instruments, particularly the Universal Declaration of Human Rights (UDHR),<sup>80</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>81</sup> In this regard, there is a duty on the part of the State to uphold and protect the rights of environmental defenders to life, liberty, and security of the person<sup>82</sup> mainly because doing so is, as mentioned earlier, a vital component of the overall protection of the environment, another obligation which a State owes its citizens. Thus, in *Vaca v. Colombia*,<sup>83</sup> the Human Rights Committee explained that where there are threats to the life and security of a

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77. See generally Antonio Autiero, *Human Dignity in an Ethical Sense: Basic Considerations*, 6 INTERDISC. J. RELIG. & TRANSFORMATION CONTEMP. SOC'Y 9, 13 (2020).

78. U.N. High Commissioner for Human Rights, *CCPR General Comment No 6: Article 6 (Right to Life)*, ¶ 1, Human Rights Committee, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 30, 1982).

79. U.N. Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, ¶ 2, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

80. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 3, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

81. International Covenant on Civil and Political Rights arts. 6, ¶ 1 & 9, ¶ 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

82. *Id.*

83. Luis Asdrúbal Jiménez Vaca v. Colombia, Communication No. 859/1999, U.N. Doc. CCPR/C/74/D/859/1999 (2002).

person — in this case, a human rights lawyer — the State has both the obligation to protect such person's life and to investigate the person responsible for making such threats.<sup>84</sup> On this point, it is essential to determine the extent of a State's duty to conduct investigations<sup>85</sup> for the purpose of protecting the right to life of environmental defenders.

*A. Standards of the Right to Effective Remedy Under International Human Rights Law and the Philippines' Compliance with these Standards*

The duty of the State to conduct investigations<sup>86</sup> insofar as the killings of and threats against environmental defenders relates to the protection of the latter's right to effective remedy. This is because a State's failure to investigate alleged violations of these defenders' rights "could in and of itself give rise to a separate breach of"<sup>87</sup> the ICCPR's Article 2 on the State's duty to ensure effective remedy for the victims of human rights violations.<sup>88</sup>

What does the right to effective remedy constitute in the context of environmental defenders? What are the legal standards of this right that international law requires a State to observe?

The main international instrument supporting and protecting environmental defenders is the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,<sup>89</sup> or what is commonly referred to as the Declaration on Human Rights Defenders (DHRD). Article 1 of the DHRD recognizes every person's right, either individually or in group, "to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."<sup>90</sup> It may be argued that this provision is broad enough to

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84. *See id.* ¶ 7.2.

85. *Id.* ¶ 5.1.

86. *Id.*

87. U.N. Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

88. ICCPR, *supra* note 81, art. 2, ¶ 3.

89. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. Doc. A/RES/53/144 (Mar. 8, 1999) [hereinafter Declaration on Human Rights Defenders].

90. *Id.* art. 1.

cover a human right to a healthy environment, especially if it is clearly written in a State's constitution.<sup>91</sup> Thus, the status of environmental defenders or environmental human rights defenders in international law has been solidified by Article 1 of the DHRD.

Corollary to recognizing the status of environmental defenders is the emphasis on the State's "prime responsibility and duty to promote and protect human rights and fundamental freedoms[,]""<sup>92</sup> as stated in the DHRD's preamble (paragraph 7), and in Articles 2, 9, and 12.<sup>93</sup> Since the DHRD made reference to a series of human rights principles and standards as enshrined in other legally binding agreements (e.g., the ICCPR),<sup>94</sup> then a State's duty to protect the rights of defenders extends to all rights mentioned in those binding agreements.<sup>95</sup> These rights include the rights to life, privacy, freedom of association and expression,<sup>96</sup> and the right to effective remedy,<sup>97</sup> among others. In the same line of argument, while the DHRD, being a mere declaration, is considered soft law without binding effect,<sup>98</sup> the right to effective remedy *per se* is enforceable under the ICCPR, a binding agreement.<sup>99</sup>

More specifically, under Article 9 (1) of the DHRD, an environmental defender has the right "to benefit from an effective remedy and to be protected in

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91. See Luis E. Rodríguez-Rivera, *The Human Right to Environment and the Peaceful Use of Nuclear Energy*, 35 DENV. J. INT'L L. & POL'Y 173, 187 (2008) (citing 4 INTERNATIONAL ENVIRONMENTAL LAW REPORTS: INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS xxxviii-xl (Alice Palmer and Cairo A.R. Robb eds., 2004)).

92. Declaration on Human Rights Defenders, *supra* note 89, pmbl. para. 7.

93. *Id.* arts. 2, 9, & 12.

94. *Id.* art. 4.

95. U.N. Secretary-General, *Human Rights Defenders*, ¶ 31, 65th Session of the General Assembly, U.N. Doc. A/65/223 (Aug. 4, 2010).

96. *Id.*

97. *Id.* ¶ 29.

98. *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, G.R. No. 173034, 535 SCRA 265, 297 (2007) (citing David P. Fidler, *Developments Involving SARS, International Law, and Infectious Disease Control at the Fifty-Sixth Meeting of the World Health Assembly*, available at <https://www.asil.org/insights/volume/8/issue/14/developments-involving-sars-international-law-and-infectious-disease> (last accessed July 31, 2021) [<https://perma.cc/U64M-4YN6>]).

99. See *Republic v. Sandiganbayan*, G.R. No. 104768, 407 SCRA 10, 86-87 (2003).

the event of the violation of”<sup>100</sup> his or her human rights. Similarly, Article 2 (3) (a) of the ICCPR, as mentioned above, requires that each State Party undertakes “[t]o ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity[.]”<sup>101</sup>

Environmental defenders can also find refuge in Principle 10 of the Rio Declaration,<sup>102</sup> which, although written in the context of public participation in decision-making processes, states that “[e]ffective access to judicial and administrative proceedings, *including redress and remedy*, shall be provided.”<sup>103</sup> The Association of Southeast Asian Nations (ASEAN), of which the Philippines is a Member-State, has a Human Rights Declaration (AHRD),<sup>104</sup> which categorically recognizes every person’s “right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted ... by the constitution or by law.”<sup>105</sup> From a wider perspective, the common thread of these provisions in the DHRD, ICCPR, Rio Declaration, and AHRD is that they provide an opportunity for the State concerned “to ‘fix’ the situation to the extent possible by providing the victim, or the victim’s survivors, with a remedy,”<sup>106</sup> after finding the violation itself.

What constitutes “effective remedy”<sup>107</sup> in the context of killings of or threats against environmental defenders can be deciphered from a range of DHRD and ICCPR provisions, complemented by the Human Rights Committee resolution of cases involving violations of rights to life, liberty, and

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100. Declaration on Human Rights Defenders, *supra* note 89, art. 9 (1) (emphasis supplied).

101. ICCPR, *supra* note 81, art. 2, ¶ 3 (a) (emphasis supplied).

102. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, annex I, princ. 10, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (Aug. 12, 1992).

103. *Id.* (emphases supplied).

104. THE ASEAN SECRETARIAT, ASEAN HUMAN RIGHTS DECLARATION AND THE PHNOM PENH STATEMENT ON THE ADOPTION OF THE ASEAN HUMAN RIGHTS DECLARATION (AHRD) (2013).

105. *Id.* ¶ 5.

106. SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 867, ¶ 25.01 (3d ed. 2013).

107. ICCPR, *supra* note 81, art. 2, ¶ 3 (a).

security of persons. Article 9 (2) of the DHRD provides some guidance by stating that

everyone whose rights or freedoms are allegedly violated has the right ... to complain to and have that complaint *promptly reviewed* in a *public hearing* before an *independent, impartial[,] and competent* judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, *providing redress*, including any *compensation* due, where there has been a violation of that person's rights or freedoms, as well as *enforcement* of the eventual decision and award, *all without undue delay*.<sup>108</sup>

Related to Article 9 (2) is Article 9 (5) of the DHRD, which provides that “[t]he State shall conduct a *prompt and impartial investigation* or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred[.]”<sup>109</sup>

Similarly, Article 2 (3) (b) and (c) of the ICCPR require a State Party to ensure that a person's remedy should be determined by “*competent judicial, administrative[,] or legislative authorities*,”<sup>110</sup> and to “*enforce such remedies when granted*.”<sup>111</sup>

It can be drawn from these DHRD and ICCPR provisions that “effective remedy” means that there should be investigation, prosecution and/or adjudication, and enforcement of the eventual decision, which may include any form of redress (such as compensation),<sup>112</sup> by an independent, impartial, and competent judiciary or body, and that the entire process must be conducted promptly or without delay.<sup>113</sup> In the words of the Human Rights Committee in *Baboeram v. Suriname*,<sup>114</sup> after finding that there was arbitrary deprivation of life, a State Party should take effective steps, which include: “(i) to *investigate the killings ...* ; (ii) to *bring to justice* any persons found to be responsible for the death of the victims[;] (iii) to *pay compensation* to the

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108. Declaration on Human Rights Defenders, *supra* note 89, art. 9 (2) (emphases supplied).

109. *Id.* art. 9 (5) (emphasis supplied).

110. ICCPR, *supra* note 81, art. 2 (3) (b) (emphasis supplied).

111. *Id.* art. 2 (3) (c) (emphasis supplied).

112. See U.N. Human Rights Committee, *supra* note 87, ¶ 16.

113. See Ernesto Benítez Gamarra v. Paraguay, Communication No. 1829/2008, ¶ 7.5, U.N. Doc. CCPR/C/104/D/1829/2008 (2012).

114. Kanta Baboeram-Adhin, et al. v. Suriname, Communication No. 146/1983 & 148-154/1983, U.N. Doc. A/40/40 (1985).



surviving families; and (iv) to ensure that the *right to life is duly protected* in [the country].”<sup>115</sup>

The foregoing effective steps, particularly the initiation of investigation and ensuring that the perpetrators are brought to justice in a prompt manner, were extensively discussed by the Human Rights Committee in *Marcellana and Gumanoy v. The Philippines*.<sup>116</sup> The communication was submitted by the survivors (relatives) of Eden Marcellana and Eddie Gumanoy, who were found dead on 22 April 2003 in Mindoro Oriental, Philippines.<sup>117</sup>

Marcellana and Gumanoy were both leaders of local human rights organizations.<sup>118</sup> On 21 April 2003, while on a fact-finding mission on the alleged killings of civilians and burning of properties by the military, Marcellana and Gumanoy were abducted by armed men.<sup>119</sup> The next day, they were found dead.<sup>120</sup> The survivors immediately filed a kidnapping and murder complaint before the Department of Justice (DOJ), which eventually dismissed the same.<sup>121</sup> They then appealed the DOJ’s decision to the Office of the President, where the case was pending as of the issuance of the Human Rights Committee’s views or decision.<sup>122</sup>

The authors likewise filed, but later withdrew for political reasons, a complaint before the Commission on Human Rights (CHR).<sup>123</sup> They also lodged similar complaints before the Philippine House of Representatives and Senate, both of whom made no concrete resolutions.<sup>124</sup> When asked for its observations, the Philippines, other than questioning the admissibility of the complaint for failure to exhaust all domestic remedies,<sup>125</sup> raised the creation

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115. *Id.* ¶ 16 (emphases supplied).

116. *Marcellana and Gumanoy v. The Philippines*, Communication No. 1560/2007, U.N. Doc. CCPR/C/94/D/1560/2007 (2008).

117. *Id.* ¶ 1.1.

118. *Id.* ¶ 2.1.

119. *Id.* ¶¶ 2.1-2.3.

120. *Id.* ¶ 2.4.

121. *Id.* ¶ 2.5.

122. *Marcellana and Gumanoy v. The Philippines*, *supra* note 116, ¶ 2.5.

123. *Id.* ¶¶ 2.6 & 5.3.

124. *Id.* ¶ 2.6.

125. *Id.* ¶ 4.1.

of a commission which probed the killings of media workers and activists as one of its mechanisms to pursue remedies concerning extra-judicial killings.<sup>126</sup>

In the complaint, the survivors claim that the Philippines violated Article 6 (1) of the ICCPR, or the right to life of the victims, and Article 2 (3), or the right to effective remedy.<sup>127</sup> In finding that the Philippines was in breach of its obligations under these provisions, the Human Rights Committee reiterated its longstanding view that “criminal investigation and consequential prosecution are necessary remedies for violations of human rights[.]”<sup>128</sup> Here, the Committee noted that more than five years had lapsed since Marcellana and Gumanoy were killed, and yet, the Philippine “authorities have not indicted, prosecuted[,] or brought to justice anyone” responsible for the killings.<sup>129</sup>

Other than the information on policy initiatives, the Philippines did not provide any information on whether an investigation was conducted to ascertain the identity of the armed men.<sup>130</sup> The absence of proper investigation to establish the responsibility of the kidnapers and murderers amounted to a “denial of justice” translating to a breach of Article 2 (3) of the ICCPR.<sup>131</sup> The Committee further explained that a State’s obligation under Article 2 (3) includes the “initiation and pursuit of criminal proceedings to establish responsibility ... and payment of appropriate compensation.”<sup>132</sup> The Committee even urged the Philippines to take measures to avoid the recurrence of such violations.<sup>133</sup>

It is argued here that the stories of Ortega, Capitan, and Arzaga, which illustrate doubt as to whether the perpetrators were brought to justice and highlight significant delays in the investigations or prosecutions, show that the violations of the rights to life and effective remedy of activists (environmental defenders, in this case) continue to occur. The killings of Ortega, Capitan, Arzaga, and many other unsung environmental heroes may constitute another

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126. *Id.* ¶ 4.8.

127. *Id.* ¶ 3.

128. Marcellana and Gumanoy v. The Philippines, *supra* note 116, ¶ 7.2.

129. *Id.* ¶ 7.3.

130. *Id.*

131. *Id.* ¶ 7.4.

132. *Id.* ¶ 9.

133. *Id.*

set of breaches by the country of its obligations under Articles 6 (1) and 2 (3) of the ICCPR<sup>134</sup> in conjunction with Articles 9 (2) and 9 (5) of the DHRD.<sup>135</sup>

In the case of Ortega, 10 years have passed since his death, but questions surrounding his killing have not been fully resolved, particularly with respect to the case concerning the mastermind.<sup>136</sup> The length of time raises the issue of lack of promptness of prosecution, which the Human Rights Committee gives importance to.<sup>137</sup> Although the Committee did not define a specific period of time as to when delay sets in, an aggregate of circumstances (e.g., years of pending resolution of the criminal complaint coupled with lack of further information from the state as to other investigations) equates to delay.<sup>138</sup> In *Marcellana and Gumanoy*, the Committee held that if domestic remedies are unduly prolonged, then exhaustion of domestic remedies — as a pre-requisite for the filing of the communication before it — is unnecessary.<sup>139</sup>

While the recent Court of Appeals decision reinstating criminal proceedings against the alleged mastermind behind Ortega's murder is a welcome step in ultimately finding justice,<sup>140</sup> the case is still far from over. The lapse of a decade since Ortega's death without the closure of criminal proceedings<sup>141</sup> certainly casts doubt on whether the perpetrators will ever be brought to justice. Following the pronouncements of the Human Rights Committee in *Marcellana and Gumanoy*, and in its General Comment No. 31, the failure of a State Party to bring those responsible to justice could, as with the failure to investigate, “in and of itself give rise to a separate breach of the Covenant.”<sup>142</sup>

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134. ICCPR, *supra* note 81, art. 6 (1) & 2 (3).

135. Declaration on Human Rights Defenders, *supra* note 89, art. 9 (2) & (5).

136. See Lian Buan, *Palawan Ex-Gov Joel Reyes, Murder Suspect, Released*, RAPPLER, Jan. 6, 2018, available at <https://www.rappler.com/nation/joel-reyes-released-jail> (last accessed July 31, 2021) [<https://perma.cc/MV6H-V5Z8>].

137. See *Marcellana and Gumanoy v. The Philippines*, *supra* note 116, ¶ 6.2.

138. *Id.*

139. *Id.*

140. Darryl John Esguerra, *CA Restores Murder Case vs Ex-Palawan Gov in Gerry Ortega Slay*, PHIL. DAILY INQ., Dec. 20, 2019, available at <https://newsinfo.inquirer.net/1203899/ca-restores-murder-case-vs-ex-palawan-gov-in-gerry-ortega-slay> (last accessed July 31, 2021) [<https://perma.cc/4XBM-DRW7>].

141. See *id.*

142. U.N. Human Rights Committee, *supra* note 87, ¶ 18.

It is irrelevant that one of the suspects in Ortega's killing — the former Governor — was sentenced by the anti-graft court<sup>143</sup> because, as the Human Rights Committee held in *Arellana v. Colombia*,<sup>144</sup> for serious violations of human rights such as the right to life, the remedy must be adequate.<sup>145</sup> Thus, the punishment imposed on the perpetrator must conform to the seriousness of the crime or violation.<sup>146</sup> In Ortega's case, it may be argued that an adequate remedy rests in the resolution of the murder case, and not the anti-graft case of one of the purported masterminds.

In the case of Capitan, despite the unwillingness of her family to file a complaint,<sup>147</sup> concerned Philippine authorities should have nonetheless initiated or continued the investigation and prosecution against persons responsible for her death; otherwise, failing to investigate her killing amounts to a breach of Article 2 (3) of the ICCPR,<sup>148</sup> as discussed above. Further, the absence of a proper investigation will be contrary to the government's aim to end impunity.<sup>149</sup>

Meanwhile, whether there is a possible breach of the obligation to uphold the right to effective remedy in Arzaga's case depends on the outcome of the murder case against his alleged killers.<sup>150</sup> However, his death and those of many other environmental defenders that came after him signify that there are gaps in the domestic institutional, legal, and policy frameworks that protect environmental defenders.

*B. Right to Effective Remedy as a Component of the Right to a Balanced and Healthful Ecology Under the Philippine Constitution*

The right to effective remedy of environmental defenders is protected not only by international law, but also by domestic constitutional law of the Philippines.

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143. *Reyes, et al.*, Criminal Case No. SB-11-CRM-0088, at 33.

144. *Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995).

145. *See id.* ¶ 8.2.

146. *Id.*

147. Kaiman, *supra* note 30.

148. ICCPR, *supra* note 81, art. 2 (3).

149. Nestor Corrales, *PH Government Is Committed to End Impunity, Says Coloma*, PHIL. DAILY INQ., Jan. 23, 2014, available at <https://newsinfo.inquirer.net/568329/ph-government-is-committed-to-end-impunity-says-coloma> (last accessed July 31, 2021) [<https://perma.cc/62QY-ABNT>].

150. *Cimatu Honors Slain Anti-Logging Official in El Nido*, *supra* note 32.

In this regard, the source of the Philippine government's obligation and commitment to uphold every person's right to effective remedy is an agglomeration of both external and internal legal instruments.

Externally, the Philippines, as a State Party to the ICCPR and its (First) Optional Protocol to the International Covenant on Civil and Political Rights,<sup>151</sup> is bound by its treaty commitments under the force of the *pacta sunt servanda* principle.<sup>152</sup> Enshrined in Article 26 of the Vienna Convention on the Law of Treaties,<sup>153</sup> this principle states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>154</sup> Therefore, the Philippines must give effect within its domestic legal order, immediately and without qualification, to all the ICCPR rights, one of which is the right to effective remedy.<sup>155</sup>

The Philippines follows the doctrine of incorporation under public international law,<sup>156</sup> which means that international law, including treaty commitments, is infused in the domestic law and becomes part of the law of the land.<sup>157</sup> The Philippine Supreme Court has interpreted this to mean that since international law becomes part of the law of the land, “no further legislative action is needed to make such rules applicable in the domestic sphere[,]”<sup>158</sup> especially if it is a duly ratified treaty which “creates demandable rights and obligations for individuals,”<sup>159</sup> such as the ICCPR rights.

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151. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

152. *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue*, G.R. No. 188550, 704 SCRA 216, 227 (2013) (citing Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331).

153. Vienna Convention on the Law of Treaties, *supra* note 152, art. 26.

154. *Id.*

155. See ICCPR, *supra* note 81, art. 2, ¶ 2 & Human Rights Committee, *supra* note 87, ¶ 14.

156. PHIL. CONST. art. II, § 2.

157. *Id.*

158. *Secretary of Justice v. Lantion*, G.R. No. 139465, 322 SCRA 160, 196 (2000) (citing JOVITO R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 12 (1992)).

159. Mark Richard D. Evidente, *The Interaction of Domestic and International Law: The Doctrine of Incorporation in Philippine Practice*, 78 PHIL. L.J. 395, 401 (2004).

A ratified treaty has the impact or equivalence of a domestic statute.<sup>160</sup> Therefore, it may be argued that in the event of a violation of the right to life, in conjunction with the right to effective remedy, an environmental defender, the victim, or his or her survivors, can resort to international law in lodging a complaint before the Philippine local courts. This realization is important because the “right to effective remedy”<sup>161</sup> does not specifically appear in the 1987 Philippine Constitution.<sup>162</sup>

The Bill of Rights under the 1987 Philippine Constitution, however, provides that “[a]ll persons shall have the *right to a speedy disposition of their cases* before all judicial, quasi-judicial, or administrative bodies.”<sup>163</sup> In connection with this, the same Constitution provides that all cases must be decided or resolved by the Supreme Court within two years, by the collegiate courts (such as the Court of Appeals) within one year, and by all other lower courts (such as the Regional Trial Court hearing Ortega’s murder case) within three months only.<sup>164</sup> In several cases, the Philippine Supreme Court adhered to the dictum “justice delayed is justice denied” in disciplining justices who failed to render decisions within a reasonable time.<sup>165</sup> As shown, however, in Ortega’s case,<sup>166</sup> these provisions are not strictly reflected in practice.

In terms of substantive rights, the rights to life and a healthy environment are well-embedded in the 1987 Philippine Constitution.<sup>167</sup> Article 2, Section 16 thereof provides that “[t]he State shall protect and advance the *right of the people to a balanced and healthful ecology* in accord with the rhythm and harmony of nature.”<sup>168</sup> In the seminal case of *Oposa v. Factoran, Jr.*,<sup>169</sup> the Philippine Supreme Court explained that advancing the people’s right to a balanced and healthful ecology “carries with it [on the part of the State] the correlative duty

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160. *Id.*

161. ICCPR, *supra* note 81, art. 2, ¶ 3 (a).

162. PHIL. CONST.

163. PHIL. CONST. art. III, § 16 (emphasis supplied).

164. PHIL. CONST. art. VIII, § 15 (1).

165. *See, e.g.,* *Orocio v. Roxas*, A.M. Nos. 07-115-CA-J & CA-08-46-J, 562 SCRA 347, 350 (2008) & *Re: Complaint Against Justice Elvi John S. Asuncion of the Court of Appeals*, A.M. No. 06-6-8-CA, 518 SCRA 512, 528 (2007) (citing *Arap v. Judge Amir Mustafa*, A.M. No. SCC-01-7, 379 SCRA 1, 5 (2002)).

166. *See* *Esguerra*, *supra* note 140.

167. PHIL. CONST. art. II, § 16 & art. III, § 1.

168. PHIL. CONST. art. II, § 16 (emphasis supplied).

169. *Oposa v. Factoran, Jr.*, G.R. No. 101083, 224 SCRA 792 (1993).

to refrain from impairing the environment.”<sup>170</sup> In his concurring opinion, Justice Florentino P. Feliciano said that “[t]he list of particular claims which can be subsumed under this rubric ... [is] entirely open-ended[.]”<sup>171</sup>

On this point, it may be argued that upholding the right of environmental defenders to effective remedy — in conjunction with their right to life — is a component of the State’s fulfillment of its constitutional duty to protect and advance the people’s right to a balanced and healthful ecology,<sup>172</sup> particularly in the context of the killings of or attacks against environmental defenders. This is because, as earlier mentioned, the Special Rapporteur views the protection of environmental defenders as “part and parcel of the overall protection of the environment.”<sup>173</sup> Without providing effective remedy for environmental defenders or their survivors, the State (Philippines) is not only condoning impunity by allowing perpetrators to go unpunished, but also sanctioning the continual abuse of the environment, which relates to the underlying reason why the defenders are killed. In doing so, the State is violating its constitutional duty to refrain from impairing the environment, following the ruling in *Oposa*.<sup>174</sup>

From the above discussion, it is clear that there is a demandable right to effective remedy which the Philippines, as a State, is duty-bound to uphold based on both international and domestic legal frameworks. Nonetheless, providing an effective remedy on the part of environmental defenders or their survivors in a post-killing or post-attack context is only one side of the coin. The other side is to change the existing legal and institutional arrangements that contribute to the culture of killings and threats. This can be done by identifying and filling in the gaps in relevant statutes and institutional structures in order to foster good practice in protecting environmental defenders.

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170. *Id.* at 805.

171. *Id.* at 815 (J. Feliciano, concurring opinion).

172. See generally Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 70 (2002) (on the relation of right to life with environmental issues).

173. U.N. Secretary-General, *supra* note 4, ¶ 92. See also Hilario G. Davide, Jr., *The Environment as Life Sources and the Writ of Kalikasan in the Philippines*, 29 PACE ENVTL. L. REV. 592, 593 (2012). Here, former Chief Justice Davide refers to the “environment” in the Philippines as “life sources.” *Id.*

174. *Oposa*, 224 SCRA at 805.

### III. FILLING-IN THE LEGAL AND INSTITUTIONAL GAPS TO PROTECT ENVIRONMENTAL DEFENDERS

Accordingly, a “good practice in protecting human rights defenders” is one which “contributes to the full respect of their rights and strengthens their security, including by mitigating the risks they face, addressing threats[,] and building support for their work.”<sup>175</sup> In his 2016 report, the Special Rapporteur on the Situation of Human Rights Defenders recommended several principles upon which States should build their practices to best protect human rights defenders.<sup>176</sup> These include focusing on “holistic security” (i.e., “physical safety, digital security[,] and psychosocial well-being” of the defenders);<sup>177</sup> recognizing that although diverse in terms of background, belief, gender, and risk position, they are interconnected;<sup>178</sup> being flexible and adaptable to the specific needs of the defenders;<sup>179</sup> allowing their participation in strategies aimed at their protection;<sup>180</sup> and adopting a rights-based approach to protection.<sup>181</sup> The last principle — a rights-based approach — calls for the conformity of relevant domestic legislation with the rights inscribed in the DHRD, and the assurance that there is no unjustified limitation in the exercise by the defenders of these rights and freedoms.<sup>182</sup>

#### *A. Making the Mining and Forestry Laws Rights-Based Statutes*

A human rights-based approach refers to a normative conceptual framework in development which is “based on international human rights standards and

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175. Special Rapporteur on the Situation of Human Rights Defenders, *Report on the Situation of Human Rights Defenders*, ¶ 33, U.N. Doc. A/HRC/31/55 (Feb. 1, 2016) (by Michel Forst).

176. *Id.* ¶ 111.

177. *Id.* ¶ 111, princ. 4.

178. *Id.* ¶ 111, princ. 2 & 5.

179. *Id.* ¶ 111, princ. 7.

180. *Id.* ¶ 111, princ. 6.

181. Special Rapporteur on the Situation of Human Rights Defenders, *supra* note 175, ¶ 111, princ. 1.

182. See United Nations, *Human Rights Defenders: Protecting the Right to Defend Human Rights* (Fact Sheet No. 29), at 30, available at <http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf> (last accessed July 31, 2021) [<https://perma.cc/7W48-5YT7>].



operationally directed to promoting and protecting human rights.”<sup>183</sup> This presupposes a situation where, for instance, a development-oriented law or policy lacks “ethical and moral dimension[,]” one which this approach aims to bring.<sup>184</sup> While there are no specific guidelines as to how a human rights-based approach should be applied across all fields (e.g., development, trade,<sup>185</sup> and health,<sup>186</sup> among others), there are core common factors in the application of this approach, namely:

- (1) “[r]eference to and starting from human rights treaties;”<sup>187</sup>
- (2) “[n]on-discrimination, special focus on disadvantaged groups[;]”<sup>188</sup>
- (3) “[p]articipation and empowerment;”<sup>189</sup> and
- (4) “[g]ood governance.”<sup>190</sup>

A rights-based approach is often contrasted with a commodity-based approach, which prioritizes short-term economic gains<sup>191</sup> to serve the needs of specific groups.<sup>192</sup> In other words, a commodity-based approach is an

183. Siri Damman, *Indigenous Vulnerability and the Process Towards the Millennium Development Goals — Will a Human Rights-Based Approach Help?*, 14 INT’L J. MINORITY & GROUP RTS. 489, 518 (2007).

184. Andrea Cornwall & Celestine Nyamu-Musembi, *Putting the ‘Rights-Based Approach’ to Development into Perspective*, 25 THIRD WORLD Q. 1415, 1416 (2004).

185. Richard Frimpong Oppong, *Trade and Human Rights: A Perspective for Agents of Trade Policy Using a Rights-Based Approach to Development*, 6 AFR. HUM. RTS. L.J. 123, 125 (2006).

186. Paul Hunt, *Interpreting the International Right to Health in a Human Rights-Based Approach to Health*, 18 HEALTH & HUM. RTS. J. 109, 110 (2016).

187. Brigitte I. Hamm, *A Human Rights Approach to Development*, 23 HUM. RTS. Q. 1005, 1011 (2001).

188. *Id.*

189. *Id.*

190. *Id.*

191. See U.N. Secretary-General, *supra* note 5, ¶ 48 (citing FRIENDS OF THE EARTH INTERNATIONAL, WE DEFEND THE ENVIRONMENT, WE DEFEND HUMAN RIGHTS (2013) & GLOBAL WITNESS, ON DANGEROUS GROUND (2016)).

192. See Cornwall & Nyamu-Musembi, *supra* note 184, at 1417 (on the needs-based approach).

extractive model geared towards feeding corporate entities and their consumer products.<sup>193</sup>

As mentioned earlier, mining and forestry are the two most dangerous sectors for environmental defenders in the Philippines.<sup>194</sup> Here, it is argued that the main issue in Philippine mining and forestry laws is that they are commodity-based laws, and not entirely rights-based. The Philippine Mining Act of 1995,<sup>195</sup> which governs large-scale offshore and on-shore mining activities (including oil exploration and extraction), while containing provisions on environmental protection,<sup>196</sup> environmental impact assessment,<sup>197</sup> the requirement to secure prior consent of indigenous people,<sup>198</sup> and the authority of NGOs to police mining activities (subject to the discretion of the Director of the Mines and Geosciences Bureau),<sup>199</sup> is largely an investment-oriented law. For instance, to encourage foreign investors, the law provides for an income tax holiday,<sup>200</sup> investment guarantees,<sup>201</sup> and an enticing 100% foreign ownership in a Financial or Technical Assistance Agreement (FTAA) scheme,<sup>202</sup> which is one of the mineral agreements recognized by the law.<sup>203</sup>

Nevertheless, this mining law is scant of any provision or mechanism allowing transparency in the handling of funds, particularly the shares of local government units (LGU). It should be noted that the mishandling of Malampaya oil funds by the former Palawan Governor was heavily criticized by Ortega when he was still alive, which purportedly led to his execution.<sup>204</sup>

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193. FRIENDS OF THE EARTH INTERNATIONAL, *supra* note 191, at 22.

194. GLOBAL WITNESS, DEFENDING TOMORROW, *supra* note 38, at 9.

195. An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation [Philippine Mining Act of 1995], Republic Act No. 7942 (1995).

196. *Id.* § 69.

197. *Id.* § 70.

198. *Id.* § 16.

199. *Id.* § 9.

200. *Id.* § 83.

201. Philippine Mining Act of 1995, § 94 (a).

202. *See* La Bugal-B'Laan Tribal Association, Inc. v. Ramos, G.R. No. 127882, 421 SCRA 148, 234 (2004).

203. Philippine Mining Act of 1995, ch. VI.

204. Jopson, *supra* note 22, at 64.

On another point, while securing the consent of indigenous people is required if the mining area will affect ancestral land,<sup>205</sup> it is unclear whether free and prior informed consent (FPIC) is required as well, and the extent of such requisite, if any, for non-indigenous local communities affected by mining-related activities, as what happened to Capitan's opposition to coal stockpile in her province. In hindsight, the lack of transparency in relation to the corrupt practices of some government officials and the absence of FPIC on the part of the affected communities regarding the proposed extractive activities are the root causes of attacks against environmental defenders.<sup>206</sup>

In Palawan particularly, securing clearance from the Palawan Council for Sustainable Development — an agency specifically established by law to govern, implement, and provide policy direction for the strategic environmental plan of Palawan<sup>207</sup> — is a pre-requisite to the issuance of a permit for proposed major activity with ecological impact such as mining.<sup>208</sup> The governing body of this council is mainly composed of government officials who may only invite members of the public and private sectors if they deem it necessary.<sup>209</sup> Presently, there is only one member each from the NGO and business sector out of 12 total members of the board.<sup>210</sup> This picture of power imbalance casts doubt on the scale of influence that environmental defenders, NGOs, and the public can provide in shaping environmental policy measures.

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205. Philippine Mining Act of 1995, § 16.

206. GLOBAL WITNESS, DEFENDERS OF THE EARTH, *supra* note 54, at 7, 21, 23, & 40.

207. An Act Adopting the Strategic Environmental Plan for Palawan, Creating the Administrative Machinery for its Implementation, Converting the Palawan Integrated Area Development Project Office to its Support Staff, Providing Funds Therefor, and for Other Purposes [Strategic Environmental Plan (SEP) for Palawan Act], Republic Act No. 7611, § 16 (1992).

208. Palawan Council for Sustainable Development, Revised Guidelines in the Implementation of the SEP Clearance System, Amending PCSD Administrative Order No. 6, Series of 2000 and PCSD Resolution No. 03-2008, Administrative Order No. 6, Series of 2008 [A.O. No. 6, s. 2008], §§ 2 (26) & 11 (Feb. 29, 2008).

209. Strategic Environmental Plan (SEP) for Palawan Act, § 16.

210. *See* Palawan Council for Sustainable Development, Providing for the Guidelines in the Processing of PCSD Permits, Clearances and Other Similar Instruments During the Period Covered by Enhanced Community Quarantine Under Proclamation No. 929, PCSD Resolution No. 20-716, at 1 (Mar. 31, 2020). The current membership composition is provided under the Excerpts from the Minutes of the 267th PCSD Regular Meeting.

The same commodity-based tone can be read from the entirety of the Forestry Reform Code of the Philippines.<sup>211</sup> Originally written to optimize forest lands and resources, the Forestry Code has a range of incentives including non-payment of rental fee for the first five years,<sup>212</sup> as well as exemption from payment of percentage tax,<sup>213</sup> among others, to establish and strengthen the wood industry. While the government has initiated a community-based forest management program to devolve some of the State's powers in forest protection to the community, in reality, many forest bureaucrats are still techno-centric, perceiving forest protection as within the domain of the State, and not of the community or civil society organisations.<sup>214</sup>

All in all, while it is comprehensible that a developing nation like the Philippines molds its mining and forestry laws and policies in a way that is attractive to investors,<sup>215</sup> this commodification and financialization of the country's natural resources is the underlying reason why conflict exists between environmental defenders and the State and non-State agents. Shifting the approach of these laws from commodity-based to rights-based by way of incorporating DHRD rights (e.g., access to information and broadening the public sphere in decision-making processes) will necessitate an amendment of these laws.

*B. Addressing the Existing Palliative Measures in Protecting Environmental Defenders*

Another observable gap in the Philippine Government's actions to protect environmental defenders is the palliative nature of the measures (i.e., the measures provide certain solutions but do not entirely eradicate the problem). This is evidenced by several task forces formed by the present and past administrations whose responsibilities are either copied from or overlapped with one another. For instance, President Gloria M. Macapagal-Arroyo created a Task Force Against Political Violence for the mobilization and

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211. Revising Presidential Decree No. 389, Otherwise Known as the Forestry Reform Code of the Philippines [REV. FORESTRY CODE], Presidential Decree No. 705 (1975).

212. *Id.* § 36 (b).

213. *Id.* § 36 (e).

214. Ganga Ram Dahal & Doris Capistrano, *Forest Governance and Institutional Structure: An Ignored Dimension of Community Based Forest Management in the Philippines*, 8 INT'L FORESTRY REV. 377, 391 (2006).

215. Philippine Mining Act of 1995, § 94.

harnessing of government agencies and the private sector to investigate and punish political violence.<sup>216</sup> This Task Force was composed of several government agencies, such as the DOJ, the police, and military forces.<sup>217</sup>

President Benigno C. Aquino III eventually repealed President Arroyo's administrative order creating the above-mentioned task force and formed a new body — the IAC on Extra-Legal Killings, Enforced Disappearances, Torture, and Other Grave Violations.<sup>218</sup> This IAC had a more detailed mandate compared with the Task Force during the Arroyo regime; however, they both tackled the same general agenda (i.e., addressing violence encountered by the activists).<sup>219</sup> This Aquino-created inter-agency committee was likewise chaired by the DOJ, with members including the Presidential Human Rights Committee, and, again, the military and police forces.<sup>220</sup>

As discussed previously, when President Duterte took the helm of the Executive branch of the government, he created another Task Force on Violence Against Media Workers.<sup>221</sup> The creation of this task force superseded Aquino's Inter-Agency Committee, but only insofar as media workers are concerned.<sup>222</sup> In effect, there appears to be two present task forces whose functions are separated by a very thin line. The Media Workers Task Force is also chaired by the DOJ, with the same membership as the inter-agency committee, but with observers from media personnel associations.<sup>223</sup> Noticeably, the Department of Environment and Natural Resources (DENR) and CHR are not represented in any of the above three task forces. Further, all these presidential orders, from Arroyo to Duterte, aimed to achieve a similar purpose (i.e., to end extra-judicial killings and disappearances of human rights activists).<sup>224</sup>

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216. Office of the President, Creating a Task Force Against Political Violence, Administrative Order No. 211, Series of 2007 [A.O. No. 211, s. 2007], § 1 (Nov. 26, 2007).

217. *Id.* § 2.

218. A.O. No. 35, s. 2012, § 1.

219. Compare A.O. No. 35, s. 2012, § 2, with A.O. No. 211, s. 2007, § 5.

220. A.O. No. 35, s. 2012, § 1.

221. A.O. No. 1, s. 2016, § 2.

222. *Id.* § 11.

223. *Id.* § 2.

224. A.O. No. 211, s. 2007, § 5; A.O. No. 35, s. 2012, § 2; & A.O. No. 1, s. 2016, §

The foregoing illustrates the ephemeral and fragmented actions from the Philippine government in addressing the precarious situation of human rights defenders. All these task forces were based only on presidential issuances,<sup>225</sup> which can be changed at will by the next President.<sup>226</sup> Thus, there is no continuity in the protection program. It would have been ideal for the Philippines to have, for example, a national program akin to Brazil's *Programa Nacional de Proteção aos Defensores de Direitos Humanos*,<sup>227</sup> which provides a single arena where civil society representatives and public authorities sit together, discuss, and collaborate.<sup>228</sup> By having a national program for the protection of human rights defenders, the overall government approach will not be victim-specific, as required by the Human Rights Committee.<sup>229</sup>

*C. Strengthening the Independence and Power of the Philippine Commission on Human Rights*

The national program for the protection of human rights defenders would be ideally spearheaded by the national human rights institution. In the case of the Philippines, this is the Commission on Human Rights (CHR), which is an independent constitutional body.<sup>230</sup> The CHR, however, has been subject to political pressure from both the executive and legislative branches of the government. In 2017, President Duterte threatened to abolish the CHR because of its criticism against his war on drugs and alleged human rights abuses.<sup>231</sup> President Duterte reportedly did not want the police or military to be investigated by the CHR without his permission.<sup>232</sup> During the congressional hearing for the 2018 national budget, the President's allies in Congress voted to give the CHR a budget of only ₱1,000.00, allegedly

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225. A.O. No. 211, s. 2007, § 1; A.O. No. 35, s. 2012, § 1; & A.O. No. 1, s. 2016, § 2.

226. See A.O. No. 1, s. 2016, § 11.

227. Alice de Marchi Pereira de Souza, et al., *Protection Policies for Human Rights Defenders*, 23 INT'L J. HUM. RTS. 175, 176 (2016).

228. President of the Republic, Decree No. 9,937 of July 24, 2019 [Decree 9937/19], art. 1 (July 24, 2019) (Braz.).

229. U.N. Human Rights Committee, *supra* note 87, ¶ 17.

230. PHIL. CONST. art. XIII, § 17 (1).

231. Nestor Corrales, *Duterte Threatens to Abolish CHR*, PHIL. DAILY INQ., July 25, 2017, available at <http://newsinfo.inquirer.net/917250/duterte-threatens-to-abolish-chr> (last accessed July 31, 2021) [<https://perma.cc/7HQ6-V7VD>].

232. *Id.*

because the CHR failed to pursue criminals and to uphold human rights.<sup>233</sup> However, due to backlash from civil society, Congress was forced to restore the CHR's original budget, which was finally marked at ₱666,939,000.<sup>234</sup> The CHR's budget in 2018, however, is significantly lower than its budget was in 2017.<sup>235</sup> This scenario depicts a form of political maneuvering that can impede the full performance by the CHR of its mandate. It is said that the effectiveness and success of national human rights institutions depend on the legal, political, and financial factors wielded by the executive and legislative branches of the Government.<sup>236</sup>

Beyond the politics surrounding it, the CHR has limited powers. Under the 1987 Philippine Constitution, the CHR has, among others, the power to:

- (1) “[i]nvestigate ... all forms of human rights violations involving civil and political rights;”<sup>237</sup>
- (2) “[p]rovide appropriate legal measures for the protection of human rights of all persons[;]”<sup>238</sup> and
- (3) “[m]onitor the Philippine Government’s compliance with international treaty obligations on human rights[.]”<sup>239</sup>

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233. CNN Philippines Staff, *House Gives CHR ₱1,000 Budget for 2018*, CNN PHIL., Sept. 12, 2017, available at <https://cnnphilippines.com/news/2017/09/12/Commission-on-Human-Rights-CHR-House-budget.html> (last accessed July 31, 2021) [<https://perma.cc/55RY-L6F9>].

234. General Appropriations Act, Volume IB, Official Gazette, Fiscal Year 2018, § XXXV, at 483, available at <https://www.dbm.gov.ph/wp-content/uploads/GAA/GAA2018/VolumeI/CHR/A.pdf> (last accessed July 31, 2021) [<https://perma.cc/BL5Z-TYP3>].

235. General Appropriations Act, Volume IA & IB, Official Gazette, Fiscal Year 2017, § XXXV, at 510, available at <https://www.dbm.gov.ph/wp-content/uploads/GAA/GAA2017/VolumeI/CHR/CHR.pdf> (last accessed July 31, 2021) [<https://perma.cc/E37Q-CQD4>].

236. Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 68 (2000).

237. PHIL. CONST. art. XIII, § 18 (1).

238. PHIL. CONST. art. XIII, § 18 (3).

239. PHIL. CONST. art. XIII, § 18 (7).

The CHR, therefore, only has investigative powers, and no prosecutorial or adjudicatory authority.<sup>240</sup> If it finds that there is a need to prosecute a case before domestic courts due to possible human rights violations, it will have to request the assistance of the DOJ to lodge a complaint before the local court.<sup>241</sup>

These political and power limitations on the part of the CHR are an issue because, as shown in *Marcellana and Gumanoy*, the complainants there — survivors of the victims of killings — decided to withdraw their complaint before the CHR, believing that they would not receive appropriate remedy from that forum.<sup>242</sup> Giving the CHR a wider jurisdiction (i.e., not only to investigate, but also to resolve human rights complaints) will make it more effective, especially where the judicial system can be slow in providing remedies to the victims or their survivors.<sup>243</sup>

Ultimately, although legal and policy reforms are essential, ensuring the implementation of these reforms is equally, if not more than necessary, to have full protection of the environmental defenders. Therefore, political will is of primordial significance during the implementation process.

#### IV. CONCLUSION

This Article has shown that the killings of and attacks against environmental defenders in the Philippines have alarmingly increased, especially during the administration of President Duterte.<sup>244</sup> The increase in the number of killings, threats, and attacks against environmental defenders depicts the culture of impunity prevailing in the country today.<sup>245</sup> As exemplified by the stories of Ortega, Capitan, Arzaga, and many others, this impunity is rooted in the gray area in post-murder investigation and prosecution of the alleged perpetrators.<sup>246</sup> In a legal sense, this context relates to the right of environmental defenders or their survivors to effective remedy, and the extent of the State's obligation to uphold and protect this right based on the standards set forth in international human rights law and domestic laws of the Philippines.

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240. PHIL. CONST. art. XIII, § 18 (1).

241. See PHIL. CONST. art. XIII, § 18 (9).

242. *Marcellana and Gumanoy v. The Philippines*, *supra* note 116, ¶¶ 2.6 & 5.3.

243. See Reif, *supra* note 236, at 2 & 25.

244. GLOBAL WITNESS, *DEFENDING TOMORROW*, *supra* note 38, at 8.

245. HUMAN RIGHTS WATCH, *supra* note 51, at 541.

246. See U.N. High Commissioner for Human Rights, *supra* note 44, ¶ 50.



A reading of the relevant provisions of the DHRD, the ICCPR (as complemented by the UDHR), the Rio Declaration, the AHRD, and the views of the Human Rights Committee in a long line of cases pertaining to effective remedy will show that there is an obligation on the part of the State not only to conduct investigations, but also to ensure that the perpetrators are brought to justice with an appropriate penalty, and that redress is provided to the victim or their survivors.<sup>247</sup> The failure of a State to conduct an investigation, or its failure to bring the perpetrators to justice, could, in either case, give rise to a breach of the ICCPR,<sup>248</sup> other than a violation of a State's obligation to protect substantive rights (e.g., right to life).<sup>249</sup>

Of equal importance is the requirement on the part of the State to fulfill its obligation of providing effective remedy promptly and without delay.<sup>250</sup> Under both the ICCPR regime and Philippine constitutional law, the absence of proper investigation and unnecessary delays in the investigation and resolution of criminal cases against the suspected killers or masterminds are deemed a denial of justice.<sup>251</sup> Looking at Ortega's case, domestic remedies, particularly the resolution of his murder case,<sup>252</sup> appear to have been unduly prolonged, and thereby, raise the question on the lack of promptness of governmental actions. Moreover, this delay in the resolution of the case involving the purported mastermind behind Ortega's killing<sup>253</sup> presents another issue — whether the Philippines complied with its obligation to bring the persons responsible to justice.

Here, it is further argued that the Philippines' obligation to provide effective remedy to environmental defenders is not only based on international law, but also on domestic constitutional law. Under the 1987 Philippine Constitution, every person has a right to speedy disposition of his or her case.<sup>254</sup> Substantively, the same Constitution protects the people's rights to life,<sup>255</sup> and to a balanced and healthful ecology.<sup>256</sup> This Article has argued that

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247. Declaration on Human Rights Defenders, *supra* note 89, art. 9 (2).

248. *Id.*

249. PHIL. CONST. art. III, § 1.

250. Declaration on Human Rights Defenders, *supra* note 89, art. 9 (2).

251. Marcellana and Gumanoy v. The Philippines, *supra* note 116, ¶ 7.4.

252. Buan, *supra* note 136.

253. *Id.*

254. PHIL. CONST. art. III, § 16.

255. PHIL. CONST. art. III, § 1.

256. PHIL. CONST. art. II, § 16.

the right to effective remedy of environmental defenders falls within the ambit of their right to a balanced and healthful ecology. This is because the protection of environmental defenders is part and parcel of the holistic protection of the environment.<sup>257</sup>

The Philippine Supreme Court has interpreted the right to a balanced and healthful ecology as one which includes a “correlative duty [on the part of the government] to refrain from impairing the environment.”<sup>258</sup> Hence, without giving an effective remedy to environmental defenders or their survivors, the Philippine government is not only condoning impunity, but also impliedly allowing the continual abuse of the environment, in violation of its duty.<sup>259</sup>

Over and above the State’s provision of effective remedy is the identification and filling in of gaps in relevant domestic statutes and institutional frameworks to ensure that the root causes of attacks against environmental defenders are addressed. In the Philippines, the point of conflict occurs in extractive industries, particularly mining and logging,<sup>260</sup> as in the cases of Ortega, Capitan, and Arzaga. Often, conflict or struggle relates to lack of informed consent and space for participation on the part of the affected community, or corruption and lack of transparency in the government.<sup>261</sup> In other words, recognition of the public’s right to be informed and to participate in decision-making with respect to activities that considerably affect their welfare<sup>262</sup> is the missing piece in Philippine environmental governance, particularly in the above contested areas.

Among the good practices in protecting environmental defenders is to ensure that the above public rights are infused in relevant laws and that the national human rights institution is armed with necessary powers to protect the rights of the environmental defenders. Here, it is observed that one major gap in the mining and forestry laws of the Philippines is that both laws are commodity-based, and not rights-based, in the sense that they are designed to attract investments and financialize the environment,<sup>263</sup> with less provisions

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257. See Special Rapporteur on the Situation of Human Rights Defenders, *supra* note 175, ¶ 111, princ. 4.

258. *Oposa*, 224 SCRA at 805.

259. *Id.*

260. GLOBAL WITNESS, DEFENDING TOMORROW, *supra* note 38, at 9.

261. *See id.*

262. Special Rapporteur on the Situation of Human Rights Defenders, *supra* note 175, ¶ 111, princ. 6.

263. *See* Philippine Mining Act of 1995, § 94.

allowing the public to participate and be heard. Moreover, insofar as the Philippine human rights commission is concerned, it is institutionally weak because it is subject to political pressure from both the executive and legislative branches of the government,<sup>264</sup> and its powers are limited only to investigation, not adjudication of human rights complaints.<sup>265</sup> Filling in these legal and institutional gaps will require amendments of the law.

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264. Corrales, *supra* note 231.

265. PHIL. CONST. art. XIII, § 18 (1).